

CITIZENS DIVIDED BY *CITIZENS UNITED*: HOW THE RECENT SUPREME COURT DECISION AFFECTS SMALL BUSINESS IN POLITICS

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“Corporations are people, my friend.”¹
-Mitt Romney

I. INTRODUCTION

The funding of campaigns for public office has long been the subject of scrutiny. Influence and corruption have become more subtle in recent years with the enactment of various campaign reform acts, but the problems we see today are long-enduring.² In 1896, with the help of direct contributions from corporate treasuries, presidential candidate William McKinley outspent his Democrat-Populist opponent by nearly \$15.5 million.³ In 1905, at his annual address to Congress, Theodore Roosevelt implored Congress to reform campaign finance and curb the effect of big corporate money on elections.⁴ Though Roosevelt was a big money candidate himself, he was also a long-time supporter of progressive reforms for the public good.⁵

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¹ Philip Rucker, *Mitt Romney Says ‘Corporations Are People’ at Iowa State Fair*, WASH. POST (Aug. 11, 2011), http://www.washingtonpost.com/politics/mitt-romney-says-corporations-are-people/2011/08/11/gIQABwZ38I_story.html.

² See Theodore Roosevelt, *Political Assessments in the Coming Campaign*, ATL. MONTHLY, July 1892, available at <http://www.theatlantic.com/magazine/archive/1892/07/political-assessments-in-the-coming-campaign/6067/>. Government employees were expected to contribute a portion of their salaries to those in office in order to keep their jobs before efforts were made to enact legislation to counter the scandalous process. *Id.* Roosevelt wrote, “[T]he pressure for funds is very great. The national and state campaign committees strive urgently to get every dollar possible” *Id.*

³ Jack Beatty, *A Sisyphean History of Campaign Finance Reform*, ATL. MONTHLY, July 2007, available at <http://www.theatlantic.com/magazine/archive/2007/07/a-sisyphean-history-of-campaign-finance-reform/6066/> (McKinley raised \$16 million to his opponent William Jennings Bryan’s \$600,000. McKinley’s campaign manager was quoted as saying, “[a]ll questions in a democracy [are] questions of money.”).

⁴ President Theodore Roosevelt, President, U.S., State of the Union Address (Dec. 5, 1905), available at <http://www.presidency.ucsb.edu/ws/index.php?pid=29546#axzz1m5VNlpMO>.

With each campaign finance reform, Congress has attempted to fill the gaps in existing campaign finance laws and to limit the influence of outside spending in order to maintain the integrity of the political election process.⁶ As new vehicles for spending arise, however, the existing loopholes are exploited and Congress must again enact legislation to limit improper influence in elections.⁷ Over the last century, federal campaign finance reform has been a balancing act between eliminating corruption and protecting free speech.⁸ Tactics for gaining influence over politicians have undoubtedly changed over the last two centuries and corruption has become less obvious. Though vote buying is not the common scandal it was in the late 1800's, major legislation is still bankrolled by special interest groups and promoted in Congress by full-time lobbyists.⁹

There is no enemy of free government more dangerous and none so insidious as the corruption of the electorate. No one defends or excuses corruption, and it would seem to follow that none would oppose vigorous measures to eradicate it. A law directed against bribery and corruption in Federal elections . . . should go as far as under the Constitution it is possible to go, and should include severe penalties against him who gives or receives a bribe intended to influence his act or opinion as an elector; and provisions for the publication not only of the expenditures for nominations and elections of all candidates, but also of all contributions received and expenditures made by political committees.

Id.

⁵ Michael Beschloss & Hugh Sidey, *Theodore Roosevelt*, WHITEHOUSE.GOV <http://www.whitehouse.gov/about/presidents/theodoreroosevelt> (last visited Mar. 29, 2012).

⁶ See, e.g., 148 CONG. REC. S2099 (daily ed. Mar. 20, 2002) (statement of Sen. Chris Dodd).

⁷ See, e.g., 148 CONG. REC. S2104 (daily ed. Mar. 20, 2002) (statement of Sen. Russ Feingold) (hereinafter Feingold).

⁸ *Buckley v. Valeo*, 424 U.S. 1, 19 (1976) ("A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached.").

⁹ See Feingold, *supra* note 7. Feingold stated to the Senate:

A constituent once wrote to me that perhaps Senators should wear jackets with corporate logos on them like race cars. We laugh at these images, but inside we cringe, because this great center of democracy is truly tainted by money. Particularly after September 11, all of us in this Chamber hope the public will look to the Capitol and look to the Senate with reverence and pride, not with derision. Our task today is to restore some of that pride. I believe we can undertake that task with our own sense of pride, because we know it is the right thing to do, and we know it has to be done.

In the 105 years since Theodore Roosevelt's address to Congress, several campaign finance reforms have sought to curb the influence of outside spending in elections.¹⁰ In 2010, *Citizens United v. Federal Election Commission* marked a great change in the campaign finance rules applicable to corporations by overturning precedent set a mere seven years earlier.¹¹ Corporations, both non-profit and for-profit, are the primary beneficiaries of the Supreme Court's January 2010 ruling. In a landmark 5-4 decision, the Court held that corporate free speech rights outweigh political corruption concerns.¹² In the name of free speech for all, the Supreme Court removed a sixty-three year old ban on corporate independent expenditures and reintroduced the United States to corporation-dominated political campaigns.

This note will explore the few advantages that small corporations and businesses have over large corporations in the wake of *Citizens United*. This note will also explore some of the problems unique to small business post-*Citizens United*. This note will then examine the impact of individual small businesses in the recent 2010 midterm and 2011–2012 presidential primary campaigns. Finally, this note will explore the current campaign finance landscape and the ability of small businesses to maximize their political impact following *Citizens United*.

II. CAMPAIGN FINANCE

A. A Brief History of Campaign Finance Regulation

Monetary campaign contributions may take many forms under modern campaign finance rules. Individuals may contribute funds directly to a candidate, party or political action committee ("PAC").¹³ Money may also be spent independently of a candidate's campaign, in the form of television

Id.

¹⁰ See, e.g., Bipartisan Campaign Reform Act § 203, 2 U.S.C. § 441b (2006), *declared unconstitutional* by *Citizens United v. FEC*, 130 S. Ct. 876 (2010); Taft-Hartley Act § 302, 29 U.S.C. § 186 (2006); Tillman Act, 34 Stat. 864 (1907).

¹¹ See *Citizens United v. FEC*, 130 S. Ct. 876, 913 (2010) (overruling *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652 (1990) and part of *McConnell v. FEC*, 540 U.S. 93 (2003)).

¹² *Id.* at 898 ("Speech is an essential mechanism of democracy . . . political speech must prevail against laws that would suppress it.").

¹³ *Contribution Limits for 2011–2012*, FED. ELECTION COMM'N, *available at* <http://fec.gov/info/contriblimits1112.pdf> (last updated Feb. 2011) [hereinafter *Contribution Limits*]. A PAC is a committee "which accepts contributions or makes expenditures for the purpose of influencing or attempting to influence the nomination or election of one or more individuals to Federal, State, or local elective public office." FED. ELECTION COMM'N, FEDERAL ELECTION CAMPAIGN LAWS 98 (Apr. 2008), *available at* <http://www.fec.gov/law/feca/feca.pdf>.

advertisements or other communications that display support for or opposition to a clearly identified candidate.¹⁴ While individuals and unincorporated associations are limited in the amount they are permitted to directly contribute to a candidate, party or PAC, they may spend unlimited amounts of money on electioneering communications or express advocacy, so long as they comply with mandatory disclosure provisions.¹⁵ Both individuals and corporations are entitled to free speech rights; before modern campaign finance reform, however, corporations and individuals were not treated similarly by campaign finance laws.¹⁶

Limits on direct corporate contributions to political candidates have existed since the Tillman Act of 1907, the first statute to prohibit any corporate expenditures made in connection with an election for federal office.¹⁷ Until 1947, however, corporations were permitted to spend money independent of a candidate's campaign.¹⁸ The Taft-Hartley Act of 1947 prohibited independent expenditures for the first time in campaign finance history while leaving intact the right of corporations to spend money from segregated accounts.¹⁹ In 1971, Congress consolidated several of its earlier reform attempts and passed the Federal Election Campaign Act ("FECA"), which required that political expenses and contributions be reported and disclosed.²⁰ FECA, as amended in 1974, also established contribution and

¹⁴ *Coordinated Communications and Independent Expenditures*, FED. ELECTION COMM'N (Feb. 2012), <http://www.fec.gov/pages/brochures/indexp.shtml#IE> [hereinafter *Expenditures*]. Independent expenditures are amounts spent "expressly advocating the election or defeat of a clearly identified candidate that [are] not made in cooperation, consultation, or concert with, or at the request or suggestion of, a candidate, a candidate's authorized committee, or their agents, or a political party or its agents." 11 C.F.R. § 100.16(a) (2011).

¹⁵ See *Electioneering Communications*, FED. ELECTION COMM'N (Jan. 2010), <http://www.fec.gov/pages/brochures/electioneering.shtml>. See also *Expenditures*, *supra* note 14. For campaign finance purposes, partnerships, sole proprietorships and companies that are not incorporated are treated as individuals and subject to the same limits as individuals. Electioneering communication is defined as any "broadcast, cable, or satellite communication" that clearly identifies a candidate for federal office, is aired in the thirty days before a primary election or the sixty days before a general election and is targeted to reach 50,000 voters of the relevant electorate. 2 U.S.C. § 434(f)(3)(A)(i) (2006).

¹⁶ See, e.g., *Buckley v. Valeo*, 424 U.S. 1, 58 (1976) (striking down limits on independent expenditures for individuals and associations); *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 660 (1990) (upholding limits on corporate independent expenditures), *overruled by Citizens United*, 130 S. Ct. 876; *McConnell* 540 U.S. at 94, *overruled by Citizens United*, 130 S. Ct. 876.

¹⁷ Tillman Act, 34 Stat. 864 (1907).

¹⁸ Taft-Hartley Act § 302, 29 U.S.C. § 186 (2006).

¹⁹ *Id.*

²⁰ 2 U.S.C. § 431 (2006).

expenditure limits.²¹ FECA also formalized the PAC, which was utilized by corporations as a segregated fund in order to bypass the corporate independent expenditure ban.²² Though the FECA limits on expenditures were deemed unconstitutional in 1976, the contribution limits and reporting requirements still survive today.²³

In 2002, Congress enacted the Bipartisan Campaign Reform Act (“BCRA”) in an attempt to further rein-in outside spending and new campaign finance activities.²⁴ The BCRA banned corporate and union spending from the organization’s general treasury on electioneering communications, adding to the list of independent expenditures prohibited by the 1974 amendments to FECA.²⁵ Bans on corporate independent expenditures and direct contributions to candidates survived for the next fifty years despite numerous appeals to the Supreme Court by corporations.²⁶ Though certain BCRA provisions were struck down prior to *Citizens United*, the potential for election manipulation by large corporate spenders caused the ban on corporate independent expenditures to be generally upheld.²⁷

²¹ *Id.* FECA was amended in 1974 primarily in response to the 1972 Watergate scandal, which was funded by Nixon’s campaign committee, the Committee to Re-elect the President (CREEP). See John Dunbar, *Big Bucks Flood 2012 Election—What the Courts Said and Why We Should Care*, IWATCH NEWS (Jan. 3, 2012, 5:07 PM), <http://www.iwatchnews.org/2012/01/03/7782/big-bucks-flood-2012-election-what-courts-said-and-why-we-should-care>.

²² *Citizens United v. FEC*, 130 S. Ct. 876, 897 (2010) (“Fewer than 2,000 [sic] of the millions of corporations in this country have PACs . . . 5.8 million for-profit corporations filed 2006 tax returns.”).

²³ *Buckley v. Valeo*, 424 U.S. 1, 58 (1976); *Contribution Limits*, *supra* note 13. The contribution limits created by FECA are indexed to inflation and new limits are published in odd-numbered years. *Id.*

²⁴ Bipartisan Campaign Reform Act § 203, 2 U.S.C. § 441b (2006), *declared unconstitutional by Citizens United*, 130 S. Ct. 876. See also *McConnell v. FEC*, 540 U.S. 93, 94 (2003), *overruled by Citizens United*, 130 S. Ct. at 913.

²⁵ 2 U.S.C. § 441b.

²⁶ See, e.g., *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 674 (1990) (upholding state ban on corporate independent expenditures from corporation’s general treasury fund), *overruled by Citizens United*, 130 S. Ct. 876; *McConnell*, 540 U.S. at 104–5 (upholding BCRA prohibitions of corporate independent expenditures for express advocacy); *FEC v. Wis. Right to Life*, 551 U.S. 449, 480–81 (2007) (stating that had WRTL engaged in issue advocacy as banned in *McConnell*, 2 U.S.C. § 441b would have applied to prevent corporate independent expenditures).

²⁷ *McConnell*, 540 U.S. at 104–5.

B. Citizens United Signals the End of Austin and McConnell

Citizens United dramatically changed the campaign finance landscape.²⁸ Shortly before the primary elections *Citizens United*, a nonprofit corporation, wished to play a ninety-minute on-demand documentary critical of Democratic presidential candidate Hillary Clinton.²⁹ Apprehensive of criminal and civil penalties from the Federal Election Commission ("FEC"), *Citizens United* sought an injunction to prevent the FEC from enforcing select provisions of the BCRA.³⁰ *Citizens United's* video and promotional commercials clearly criticized Hillary Clinton as a candidate for office and fit neatly within the BCRA definition of express advocacy.³¹ Because the video and promotional commercials were funded in part by corporate treasuries, the FEC had authority under the BCRA to prohibit *Citizens United's* advertisement from airing immediately prior to primary elections.³²

Despite *Citizens United's* argument to the U.S. District Court for the District of Columbia that the BCRA provisions in question were unconstitutional, the court denied *Citizens United's* preliminary injunction.³³ *Citizens United* asserted that the ban on corporate general treasury funding was an unconstitutional burden to its free speech, but the district court upheld the BCRA's constitutionality under Supreme Court precedent.³⁴ On appeal, however, the Supreme Court struck down the independent expenditure restriction that *Austin v. Michigan Chamber of Commerce* and *McConnell v. Federal Election Commission* had upheld just a few years before.³⁵ With the overruling of *Austin* and *McConnell*, it became unnecessary for corporations to use PACs or segregated funds to finance electioneering and express advocacy communications.³⁶

Though the ban of direct corporate contributions survived *Citizens United*,³⁷ corporations earned the freedom to spend unlimited amounts

²⁸ Spencer MacColl, *Citizens United Decision Profoundly Affects Political Landscape*, OPENSECRETS.ORG (May 5, 2011, 11:16 AM), <http://www.opensecrets.org/news/2011/05/citizens-united-decision-profoundly-affects-political-landscape.html>.

²⁹ *Citizens United*, 130 S. Ct. at 887–88.

³⁰ *Citizens United v. FEC*, 530 F. Supp. 2d 274, 275 (D.D.C. 2008).

³¹ *Citizens United*, 130 S. Ct. at 890.

³² *Citizens United*, 530 F. Supp. 2d at 276–77.

³³ *Id.* at 279.

³⁴ *Id.* at 278.

³⁵ *Citizens United*, 130 S. Ct. at 918 (holding that 2 U.S.C. § 441b was unconstitutional as it applied to corporations because it limited the free speech of organizations under the protection of the First Amendment).

³⁶ *Id.* at 913.

³⁷ *Id.* at 887; Press Release, Fed. Election Comm'n, FEC Statement on the Sup. Ct.'s Decision in *Citizens United v. FEC* (Feb. 5, 2010), available at

independent of a candidate's campaign without having to resort to 'a "burdensome alternative" like a PAC.³⁸ Rather than being required to form, staff and monitor a PAC, a corporation's board of directors needs merely to make the decision to spend its funds on an independent advertisement. The Court, in striking down the sixty-three year old independent expenditure ban, granted corporations the same election-communication rights as unincorporated business associations.³⁹

Citizens United also challenged the disclaimer and disclosure provisions of the BCRA, but the Court upheld those requirements.⁴⁰ These requirements mandated Citizens United disclose its responsibility for its advertisements and the names of certain contributors.⁴¹ Despite the "burden" on a corporation's ability to speak politically, the Court reaffirmed *Buckley v. Valeo* and upheld the BCRA disclosure requirements as constitutional.⁴² Now, a non-candidate funded electioneering communication must include a clearly spoken disclaimer of responsibility and expenses in excess of \$10,000 per year must be disclosed to the FEC.⁴³ Failure to disclose the required information to the FEC under 2 U.S.C. § 434(f) is perjury.⁴⁴

C. The Current State of Corporate Campaign Finance

Citizens United resulted in an interesting side-effect: the birth of the "Super PAC."⁴⁵ A Super PAC is a political group that can raise and spend unlimited amounts of money on independent expenditures.⁴⁶ As long as the Super PAC discloses its donors to the FEC and does not coordinate with a

<http://www.fec.gov/press/press2010/20100205CitizensUnited.shtml> (noting the ban on direct corporate and union expenditures remains in effect and will be enforced).

³⁸ *Citizens United*, 130 S. Ct. at 897 ("A PAC is a separate association from the corporation . . . PACs are burdensome alternatives; they are expensive to administer and subject to extensive regulations.").

³⁹ *Id.* at 908.

⁴⁰ *Id.* at 914.

⁴¹ *Id.* at 913–14.

⁴² *Id.* at 914 (noting that if a corporation can prove that its contributors would be subject to "threats, harassment, or reprisals" because of the required disclosure of names, an as-applied challenge could be successful).

⁴³ 2 U.S.C. § 441D(d)(2) (2006); 2 U.S.C. § 434(f)(1) (2006).

⁴⁴ 2 U.S.C. § 434(f).

⁴⁵ Ctr. for Responsive Pol., *Super PACs*, [OPENSECRETS.ORG](http://www.opensecrets.org), <http://www.opensecrets.org/pacs/superpacs.php?cycle=2010> (updated daily) (last visited Feb. 12, 2012). Super PACs were made possible by a combination of the Court's ruling in *Citizens United* and the United States Court of Appeals for the District of Columbia ruling in *SpeechNow.org v. FEC*, 599 F.3d 686 (2010) (expanding on *Citizens United* and holding that limits on contributions to groups that make independent expenditures (like *SpeechNow.org*) are unconstitutional).

⁴⁶ *Id.*

candidate's campaign, it can accept unlimited amounts of money from corporations and other outside sources.⁴⁷ Though Super PACs operate independently of candidates' campaigns, they are often run by close supporters of the political candidates they support.⁴⁸ Unlike the standard PAC, a Super PAC cannot contribute directly to a candidate's campaign.⁴⁹ But, the potential for effective independent spending is great. Candidates may not be spending the money raised by Super PACs themselves, but they are clearly receiving the benefit of corporations' new freedom to spend politically from their general treasuries as evidenced *infra*.

In the 2010 mid-term election cycle, \$15.5 million of the \$65 million raised by Super PACs came from corporate treasuries.⁵⁰ In the first half of 2011, the more than \$25 million contributed to Super PACs was concentrated in a small group of "elite" donors.⁵¹ Despite their rather ambiguous names, Super PACs are often aligned with a single candidate and receive contributions because of their affiliation with that particular candidate.⁵² Newfound political freedom of corporations following *Citizens United* has resulted in a staggering amount of money passing through Super PACs: some calculations place Super PAC spending around \$13.5 million for the January Iowa Caucus alone.⁵³ Restore Our Future, a Super PAC aligned with 2012 Republican presidential candidate Mitt Romney, reported raising \$12 million in the first six months of 2011.⁵⁴ Only some of the

⁴⁷ *Id.*

⁴⁸ Ryan J. Reilly, 'Just the Beginning': Flood of Super PAC Money into Iowa Offers 2012 Preview, TALKING POINTS MEMO (Jan. 3, 2012, 2:10 PM), http://tpmmuckraker.talkingpointsmemo.com/2012/01/just_the_beginning_flood_of_super_pac_money_into_iowa_offers_2012_preview.php?ref=fpnewsfeed.

⁴⁹ Spencer MacColl, *Who's Who in the World of Super PACs?*, OPENSECRETS.ORG (Aug. 24, 2011, 4:25 PM), <http://www.opensecrets.org/news/2011/08/world-of-super-pacs.html>.

⁵⁰ Dan Froomkin & Jake Bialer, *How 'Independent Expenditures' Are Remaking Elections*, HUFFPOST POL. (June 11, 2011), http://www.huffingtonpost.com/2011/04/11/elections-independent-expenditures_n_844731.html.

⁵¹ MacColl, *supra* note 49 (noting that liberal and conservative Super PACs have collected 80% of their contributions from twenty-three and thirty-five donors, respectively).

⁵² Tom Hamburger, Matea Gold & Melanie Mason, *Major Election Spenders to Remain Secret Until After First Votes*, LA TIMES (Oct. 6, 2011), <http://www.latimes.com/news/nationworld/nation/la-na-presidential-money-20111006,0,1570629.story>.

⁵³ John Dunbar, 'Super PACs' Spend \$13 Million on Early Primaries, Romney Top Beneficiary, IWATCH NEWS (Jan. 27, 2012, 5:02 PM), http://www.iwatchnews.org/2012/01/02/7774/super-pacs-spend-13-million-early-primaries-romney-top-beneficiary/?utm_source=iwatchnews&utm_medium=site-features&utm_campaign=most-active.

⁵⁴ *Id.*

money spent on campaigns has thus far been tied to specific donors due to the delay between fundraising and reporting.⁵⁵

Despite corporations' recent freedom to make independent expenditures without the use of a PAC, true corporate independent expenditures have been rare. Only three corporations, spending roughly \$47,000 for the 2010 federal mid-term elections, utilized *Citizens United* to make independent expenditures from their general treasury funds.⁵⁶ These three corporations were, quite surprisingly, small, family-owned businesses.⁵⁷ Predictably, the corporations spending the most from their general treasuries (but utilizing Super PACs) are the corporations with the most money to spend.⁵⁸ Despite *Citizens United*, the spike in independent expenditures illustrated in Figure 1, *infra*, has not come directly from corporations;⁵⁹ rather, the organizations funded by newly-freed corporate general treasuries have had the greatest impact.⁶⁰

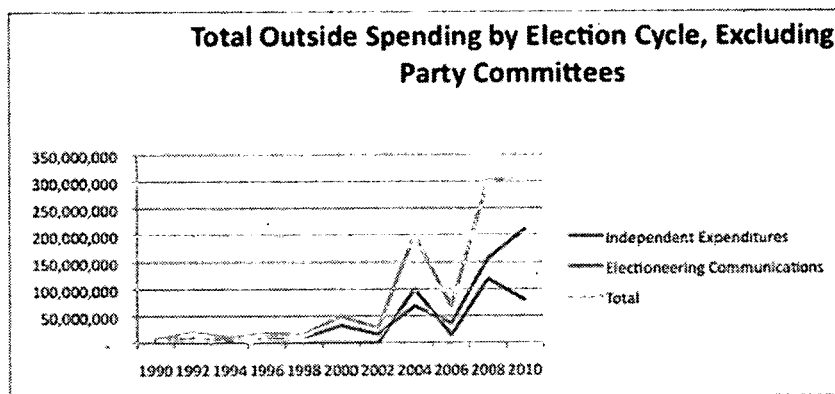


Figure 1⁶¹

⁵⁵ *Id.* (stating ten of the twelve outside Super PACs had not yet disclosed their donors).

⁵⁶ Brad Smith, *Early Returns Indicate Benefits of Citizens United*, SpeechNow.org Decisions, CTR. FOR COMPETITIVE POL. (Mar. 26, 2011), <http://www.campaignfreedom.org/blog/detail/early-returns-indicate-benefits-of-citizens-united-speechnoworg-decisions>.

⁵⁷ *Id.*

⁵⁸ See Ctr. for Responsive Pol., *2010 Top Donors to Outside Spending Groups*, OPENSECRETS.ORG, <http://www.opensecrets.org/outsidespending/summ.php?cycle=2010&disp=D&type=O> (last visited Nov. 6, 2011). See also Michael Beckel, *Influx of Corporate Political Cash Followed Pivotal Federal Court Decision*, OPENSECRETS.ORG (Mar. 25, 2011, 5:40 PM), <http://www.opensecrets.org/news/2011/03/influx-of-corporate-political-cash.html> (stating major donors to Super PACs include MGM Resorts International, American Financial Group and Jelly Belly Candy Company).

⁵⁹ *Citizens United v. FEC*, 130 S. Ct. 876, 918 (2010).

⁶⁰ See Beckel, *supra* note 58.

Contributing to an organization rather than making an independent expenditure has many advantages, including the opportunity to combine the efforts of multiple donors interested in the same issues. Campaign expenditures are shifting increasingly toward organizations other than Super PACs, however. In addition to the use of the Super PAC, nonprofit organizations under Internal Revenue Code ("IRC") sections 501(c) and 527 have seen a marked increase in collections post-*Citizens United*.⁶² A 501(c) or 527 organization does not have to disclose its donors and can accept unlimited amounts of money as long as it does not coordinate with a candidate.⁶³ Furthermore, both 501(c) and 527 organizations cannot contribute directly to a candidate's campaign or a party committee.⁶⁴ Of the millions contributed to non-disclosing organizations in the 2010 mid-term election cycle, the actual contributions from corporations are unclear. One thing that remains clear, however, is the political advantage of corporations that can make large contributions without public disclosure.⁶⁵

With the added money from corporate treasuries, political races have arguably become more competitive and allowed candidates to challenge incumbents.⁶⁶ However, the limited disclosure requirements and unlimited potential funds may let "big money win[] again," and hide the true identities and agendas of spenders.⁶⁷ Since *Citizens United*, the FEC has

⁶¹ Data used from: Ctr. for Responsive Pol., *Outside Spending*, OPENSECRETS.ORG, <http://www.opensecrets.org/outsidespending/> (last visited Mar. 20, 2012).

⁶² See Beckel, *supra* note 58. Non-disclosing non-profit groups reported spending about \$140 million in the 2010 mid-term election cycle, a 61% increase over 2008.

Id.

⁶³ *Id.*

⁶⁴ See I.R.C. §§ 501, 527 (2006). Section 527 organizations are political groups, organized for the purpose of influencing elections. I.R.C. § 527. In contrast, 501(c) organizations can only exist under § 501 of the I.R.C. if they are not organized primarily to influence elections (i.e. the Chamber of Commerce). I.R.C. § 501. Both types of organizations can raise and spend unlimited amounts of independent expenditures, however, and do not need to disclose any donors to the FEC. *Id.*

⁶⁵ Beckel, *supra* note 58 ("Most corporations will much prefer to give without their identities being publicly disclosed . . . [i]t saves them the sort of trouble Target got into with shareholders and customers.").

⁶⁶ *Campaign-Finance Reform, RIP*, WALL ST. J. (Nov. 2, 2010), <http://online.wsj.com/article/SB10001424052702303341904575576542623346452.html>.

⁶⁷ Bob Edgar, *Still Another Hole in Our Campaign Finance Laws*, HUFFPOST POL. (Oct. 13, 2011, 5:27 PM), http://www.huffingtonpost.com/rev-bob-edgar/citizens-united-campaign-finance_b_1009611.html.

So big money wins again. We're headed into a campaign that will be largely financed by deep-pocketed companies and trade groups whose identities and agendas will be largely hidden from the voting public. But when the winners of those campaigns take office, you can be sure they'll know who paid for every ad and exactly what their benefactors expect in return.

deadlocked on many pressing issues.⁶⁸ The six-member Commission has been frequently unable to reach a compromise on many recent campaign finance issues, resulting in scattered enforcement and regulatory change to campaign finance in the period following *Citizens United*.⁶⁹ As of February 2012, the FEC had yet to update its website to reflect the impact of *Citizens United* on campaign finance laws.⁷⁰ Though small businesses have increased opportunities to become actively engaged in the political arena, those opportunities are available to large corporations as well: large corporations that have much larger treasuries from which to draw funds. Should the FEC continue on its current track—deadlock—small businesses may face difficulty in both determining the scope of what is permissible and in making their voices heard over those of the big spenders.

D. *Citizens United's Impact on State Campaign Finance Laws*

Though federal laws regulate the conduct of business associations in some respects, businesses are organized under state law. Many large corporations lobby for federal budget appropriations or tax changes,⁷¹ but some businesses may also find it useful to have a state representative sympathetic to their interests. Small businesses especially may find it advantageous to take an active role in state or local elections. Small businesses, because of their size and localized presence, often feel the desire to actively participate in their communities.⁷² State and local elections are a great opportunity for involvement; moreover, twenty-seven states do not ban direct corporate contributions to candidates.⁷³ State

Id.

⁶⁸ Kim Geiger & Melanie Mason, *Stephen Colbert Appears Before FEC, With Some Serious Business*, L.A. TIMES (July 1, 2011), <http://www.latimes.com/news/nationworld/nation/la-na-colbert-fec-20110701,0,5605130.story>.

⁶⁹ Marian Wang, *FEC Deadlocks (Again) on Guidance for Big-Money Super PACs*, PROPUBLICA, (Dec. 2, 2011, 12:21 PM), <http://www.propublica.org/article/deadlocks-again-on-guidance-for-big-money-super-pacs> (highlighting American Crossroads Super PAC's request for guidance from the FEC which resulted in a 3-3 split). The American Crossroads can either choose not to create the ad in question or continue, risking a further deadlock when its ad is later challenged. *Id.*

⁷⁰ *Expenditures*, *supra* note 14.

⁷¹ Ctr. for Responsive Pol., *Lobbying: Top Issues*, OPENSECRETS.ORG, <http://www.opensecrets.org/lobby/top.php?indexType=u> (last visited Mar. 28, 2012).

⁷² See Jamillah Warner, *Small Business Marketing and Community Service*, SMALL BUS. TRENDS (Jan. 24, 2011), <http://smallbiztrends.com/2011/01/small-business-marketing-and-community-service.html>.

⁷³ *State Limits on Contributions to Candidates, 2011–2012 Election Cycle, Updated Sept. 30, 2011*, NAT'L CONF. OF ST. LEGS., available at http://www.ncsl.org/Portals/1/documents/legismgt/Limits_to_Candidates_2011-2012.pdf [hereinafter *State Limits*].

regulations differ from the federal law, however, and often impose greater administrative requirements than the federal government.

In the wake of *Citizens United*, many states are taking it upon themselves to limit the impact of the holding on state campaigns or to expand on the disclosure requirements the Court deemed constitutional.⁷⁴ Colorado Governor Bill Ritter signed a bill in May 2010 that requires anyone who accepts funds for independent expenditures to maintain a separate bank account for the political money.⁷⁵ Michigan legislation introduced in 2010 would require the disclosure of individual contributors to corporations that make independent expenditures, and require shareholder approval of independent campaign expenditures.⁷⁶ Though Michigan has been unsuccessful so far in enacting a comprehensive disclosure reform, state officials continue to introduce bills supporting transparency in elections.⁷⁷

Montana has also continued to fight *Citizens United*.⁷⁸ At the close of 2011, the Montana Supreme Court determined that *Citizens United* did not compel a finding that limits on corporate independent expenditures were unconstitutional.⁷⁹ Western Tradition Partnership ("WTP") sued the Montana Attorney General in October 2010, alleging that the regulation of its independent expenditures was a violation of its First Amendment rights.⁸⁰ Rather than agree, the Montana Supreme Court upheld the challenged limits.⁸¹ The court noted that individual contributions are significantly less in states that allow unlimited corporate spending,⁸² and stated that organizations like WTP are a threat to the "political marketplace."⁸³ The court further determined that WTP, an anti-environmental organization, was a "conduit of funds for persons and entities including corporations who want to spend money anonymously to influence Montana elections" and subject to regulation.⁸⁴

⁷⁴ See *Citizens United Decision Spurs State Campaign Finance Legislation*, OMBWATCH (June 2, 2010), <http://www.ombwatch.org/node/11042>.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ See John Irwin, *Michigan House Democrats Aim to Strengthen Transparency*, CENT. MICH. LIFE, (Feb. 7, 2012, 5:20 PM), <http://www.cm-life.com/2012/02/07/michigan-house-democrats-aim-to-strengthen-transparency/>.

⁷⁸ *W. Tradition P'ship, Inc. v. Attorney Gen. of State*, 271 P.3d 1, 2011 MT 328 (Mont. 2011).

⁷⁹ *Id.* at ¶ 15.

⁸⁰ *Id.* at ¶ 2.

⁸¹ *Id.* at ¶ 48.

⁸² *Id.* at ¶ 38.

⁸³ *Id.* at ¶ 11 (citing *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 264 (1986)).

⁸⁴ *W. Tradition P'ship, Inc.*, 2011 MT at ¶ 7.

Small businesses may be more likely to spend money politically in local or state elections than in the national political arena, despite the removal of many federal spending limits. Small businesses often have a significant localized presence and are involved in their communities. Furthermore, many state ballot initiatives can directly affect businesses. However, like federal elections and lobbying, state politics are dominated by big money.⁸⁵ The place of small businesses in the modern campaign-finance era of unrestrained spending by multi-million dollar entities remains to be seen.

III. CAMPAIGN FINANCE AND SMALL BUSINESS

Before *Citizens United*, if an incorporated entity wanted to make a political expenditure in support of an issue or candidate, it had to utilize a PAC or segregated fund.⁸⁶ After *Citizens United*, a corporation is free to contribute unlimited amounts from its general treasury to expressly advocate for or against issues and candidates or contribute to independent political organizations.⁸⁷ It is the practical aspects of corporations' newfound freedom that has led to little appreciable effect on small businesses in political campaigns. When corporate money is tight, retaliation is possible or the "bang for your buck" is uncertain, active small business funding of political campaigns is unlikely to occur.

A. Organization and Business Structure

One popular corporate structure utilized by small businesses is the closely-held corporation.⁸⁸ Closely-held corporation organization rules differ by jurisdiction, but most state statutes allow for management of the corporation by its shareholders rather than an independent board of directors.⁸⁹ Smaller corporations can also elect to be treated as Subchapter S

⁸⁵ Linda Casey, *Top Recipients of Federal Tax Breaks Donate to State Campaigns*, NAT'L INST. OF MONEY IN ST. POL. (Aug. 31, 2011), <http://www.followthemoney.org/press/ReportView.phtml?r=460>. Two-thirds of the \$78 million spent by Chevron, Bank of America, GE, ExxonMobil and Boeing in the last decade was spent opposing state ballot initiatives, heavily concentrated in Colorado and California. *Id.*

⁸⁶ *McConnell v. FEC*, 540 U.S. 93, 104–5 (2003), *overruled by Citizens United v. FEC*, 130 S. Ct. 876 (2010).

⁸⁷ *Citizens United*, 130 S. Ct. at 908.

⁸⁸ The corporate form is often utilized for its limited liability, perpetual existence and easy transferability of ownership interests. 18 C.J.S. *Corporations* §§ 1, 285 (2012).

⁸⁹ *See, e.g.*, 8 DEL. C. § 351 (2011). For example, a closely-held corporation under Delaware law must have fewer than 30 shareholders and may not publicly offer its stock on a public stock exchange. 8 DEL. C. § 342 (2011).

Corporations ("S-Corps") for federal income tax purposes.⁹⁰ S-Corps have the benefit of being pass-through entities; consequently, they face federal taxation only at the individual shareholder level.⁹¹ Owners of closely-held corporations, whether they have elected S-Corp status or not, enjoy less disconnect between their goals as an owner and the activities carried out by their corporation because they are directly responsible for the day-to-day operations.⁹²

Small-corporation campaign spending is more like union support of a cause than large corporation campaign spending, though both unions and corporations may now make independent expenditures from their general treasuries.⁹³ A shareholder in a closely-held corporation often serves the dual role of owner and employee. As an employee, an unhappy shareholder can hardly quit when a majority of shareholders decide to spend corporate assets promoting their own political agenda. Much like a union member who disagrees with a union's advocacy, a small business shareholder faces great costs if he decides to exercise alternatives outside his small business.⁹⁴ However, since the shareholders of closely-held corporations often work together to manage the business, it is more likely decisions regarding the expenditure of funds for political advocacy will be agreed to by all shareholders to preserve a working relationship.

B. *Vote, Sell, Sue*

A disagreeing shareholder in any public corporation generally has three options. First, he can vote his shares in an attempt to change the make-up of

⁹⁰ *S Corporations*, IRS, <http://www.irs.gov/businesses/small/article/0,,id=98263,00.html> (last updated Jan. 18, 2012).

⁹¹ *Id.* S-Corps must also meet several requirements in order to take advantage of the single level of taxation, including a limit on the number and type of shareholders. *Id.* In contrast, C Corporations face taxation at both the corporate level (the C Corporation is responsible for filing a yearly tax return with the IRS) and at the shareholder level when the corporation pays dividends (at the shareholder's dividend tax rate). *Corporations*, IRS, <http://www.irs.gov/businesses/small/article/0,,id=98240,00.html> (last visited Mar. 27, 2012).

⁹² See John W. Welch, *Shareholder Individual and Derivative Actions: Underlying Rationales and the Closely Held Corporation*, 9 J. CORP. L. 147, 149 (Winter 1984).

⁹³ See *Expenditures*, *supra* note 14.

⁹⁴ See Victor Brudney, *Business Corporations and Stockholders' Rights Under the First Amendment*, 91 YALE L.J. 235, 268 (Dec. 1981) ("The necessary compelling state interest is to be found at least in the need to protect individual stockholders against being forced to choose between contributing to political or social expressions with which they disagree or foregoing opportunities for profitable investment.").

the board of directors or a by-law governing the corporation's actions.⁹⁵ Second, he can sell his shares for their fair market value in the public market.⁹⁶ Third, and most extreme, he can bring a lawsuit on behalf of the corporation if some measurable harm has occurred.⁹⁷ Practically, private corporation shareholders have few of the same options available. A shareholder with a minority interest in a large corporation has little power to evoke change without the support of other shareholders, but may sell his shares if his interests are truly offended by corporate actions. There are ready markets on which to sell a nationally-traded public corporation's stock, though stock ownership often results in economic benefits beyond mere trading.⁹⁸

While closely-held corporations must follow many of the same incorporation and governance procedures as regular corporations, management functions are performed by shareholders. In Delaware, for instance, all closely-held corporations are private corporations,⁹⁹ so no market exists in which a shareholder can sell his interest for its fair market value. Moreover, because a shareholder in a closely-held corporation is usually involved actively in the business, abandoning his investment is not a viable option. Though closely-held corporations offer many advantages for a shareholder desiring to take an active role in his investment, they leave few options for owner-managers in times of discord.

1. *The Problem: A Minority Shareholder Disagrees with an Independent Expenditure*

The courts are rife with examples of minority shareholder disagreement in both large and small corporations. A disagreement is a more serious problem in a closely-held corporation than a large public corporation because of the unique owner-manager structure. Because shareholders in closely-held corporations are involved in the day-to-day management of the corporation, each is assumed to support business decisions like the authorization of an independent expenditure. However, as Justice Stevens

⁹⁵ Robert B. Thompson, *Preemption and Federalism in Corporate Governance: Protecting Shareholder Rights to Vote, Sell, and Sue*, 62 L. & CONTEMP. PROBS. 215, 216 (Summer 1999).

⁹⁶ *Id.* at 217 ("[A] shareholder must obtain liquidity not from the corporation but from the market, if there is one.").

⁹⁷ *Id.*

⁹⁸ *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 653 (1990). Divesting is especially extreme when you consider the fact that a corporation exists to maximize shareholder returns, and shareholders tend to invest in corporations for economic rather than political benefits.

⁹⁹ 8 DEL. C. § 342 (2011) ("(3) The corporation shall make no offering of any of its stock of any class which would constitute a 'public offering' within the meaning of the United States Securities Act of 1933 as it may be amended from time to time.").

noted in his dissent from *Citizens United*, it is often unclear *who* is speaking when a business corporation makes a political expenditure.¹⁰⁰ Corporations, incapable of independent thought, must “speak” through actions authorized by their boards of directors.¹⁰¹

The difficulty in determining who is speaking is less obvious in a closely-held corporation because the shareholders are not “far removed from the day-to-day decisions of the firm [or have] political preferences...opaque to management.”¹⁰² However, a similar problem arises when an owner-manager disagrees with the majority about the corporation’s political expenditures. In this case, a political expenditure is not acting as the voice of the entire corporation. Rather, the “speech” is merely the beliefs of a few individuals speaking through the corporate form. When the economic condition of the business is stable, every owner-manager of a closely-held corporation may agree to or be indifferent toward corporate political spending. When a difference of opinion exists, however, the decision to spend money can generally be made with a mere majority vote over the voice of a dissenting shareholder.

Former President George W. Bush recognized the potential harm to shareholders’ rights in his signing statement to the Bipartisan Campaign Reform Act.¹⁰³ Bush highlighted the danger of “involuntary political activities” and the need to remedy this “defect” in the current campaign finance structure.¹⁰⁴ Though no federal laws have been enacted to date to limit the power of the majority shareholders over the dissenting minority, or to protect shareholders from their politically active board of directors, legislation was introduced to mitigate *Citizens United*’s impact.¹⁰⁵ The Democracy is Strengthened by Casting Light On Spending in Elections Act (“DISCLOSE Act”) would have required additional disclosure and limits on independent expenditures.¹⁰⁶ The DISCLOSE Act was targeted toward increasing transparency in elections, and included a provision mandating detailed corporate disclosures to shareholders about campaign-related activities.¹⁰⁷ It also contained provisions prohibiting government contractors or businesses applying for federal aid from making independent

¹⁰⁰ *Citizens United v. FEC*, 130 S. Ct. 876, 972 (2010) (Stevens, J., dissenting).

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ George W. Bush, President, U.S., Statement by President George W. Bush upon Signing H.R. 2356, Mar. 27, 2002.

¹⁰⁴ *Id.* (“I would have preferred a bill that . . . protect[s] . . . shareholders from involuntary political activities undertaken by their leadership. Individuals have a right not to have their money spent in support of candidates or causes with which they disagree . . .”).

¹⁰⁵ See DISCLOSE Act, H.R. 5175, 111th Cong. (2010).

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* § 328.

expenditures.¹⁰⁸ The DISCLOSE Act died in the Senate at the end of the 111th Congress, but reform efforts continue in both federal and state legislatures.¹⁰⁹

Minority shareholders have few options when it comes to expressing disagreement. If a minority shareholder wishes to leave his corporation, he is interested in at least receiving a fair price for his share. Leaving a closely-held corporation carries more extreme consequences for an owner-manager than for a shareholder in a publically-traded company; owners of small businesses often do not passively own their interests.¹¹⁰ There is no public trading market for the stock in a small, private company,¹¹¹ nor is there a guarantee of a fair price.¹¹² Moreover, the majority shareholders have no incentive to repurchase shares at a fair price if the relationship between shareholders has soured. But, even if a fair price is not forthcoming from the majority shareholders, a minority shareholder is not entirely without redress.¹¹³

Dissatisfied shareholders of closely-held corporations have judicial alternatives, though these alternatives often come at a steep cost and at great risk to the dissenting shareholder. Some states have allowed shareholders of closely-held corporations to petition the court for dissolution; Delaware, however, has not.¹¹⁴ In jurisdictions other than Delaware, courts have “broad equitable powers to fashion remedies” when

¹⁰⁸ *Id.* § 104 (prohibiting independent expenditures for persons with federal government contracts of greater than \$10 million).

¹⁰⁹ Jordan Fabian, *Senate Again Fails to Advance Campaign Finance Bill with ‘No’ Vote from Snowe*, THE HILL (Sept. 23, 2010 1:57 PM), <http://thehill.com/blogs/blog-briefing-room/news/120589-senate-again-fails-to-end-debate-on-campaign-finance-bill>.

¹¹⁰ 1 WILLIAM MEADE FLETCHER ET AL., FLETCHER CYCLOPEDIA OF THE LAW OF CORPORATIONS § 70.10 (perm. ed., rev. vol. 2011) (“Courts generally identify common law close corporations by three characteristics: (1) a small number of shareholders; (2) no ready market for corporate stock; and (3) active shareholder participation in the business.”).

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ See *In re Kemp and Beatley*, 473 N.E.2d 1173, 1175–76 (N.Y. 1984); *Donahue v. Rodd Electrotape Co. of New England, Inc.*, 328 N.E.2d 505, 513 (Mass. 1972).

¹¹⁴ 8 DEL. C. § 273 (2011) (permitting judicial dissolution for corporations with two shareholders who cannot agree regarding the continuation or winding up of a joint venture). Close corporations are free under Section 355 to include a provision in their certificates of incorporation authorizing shareholders to dissolve the corporation when certain circumstances arise, but the courts have not recognized judicial dissolution. 8 DEL. C. § 355 (2011). Though other states treat corporations like closely-held corporations if they exhibit the statutory characteristics, Delaware only allows corporations that have *elected* to be closely-held corporations to take advantage of the statutory benefits. See *Nixon v. Blackwell*, 626 A.2d 1366, 1380–81 (Del. 1993).

majority shareholders act oppressively toward the minority shareholder such that the majority is effectively “freezing out” the complaining party.¹¹⁵ Share repurchase agreements are also a valid contractual option, but carry serious financial risks: small business owners depend on sharing in the financial success of their companies like employees depend on their jobs.¹¹⁶

2. Maximizing Corporate Profits or Maximizing Political Impact?

One of Justice Stevens’ critiques in his dissent was that allowing unlimited independent expenditures from a corporation’s general treasury fund does nothing to protect a shareholder’s right to maximize corporate profit.¹¹⁷ In traditionally organized corporations, a board of directors makes decisions regarding day-to-day business activities and most major transactions without shareholder approval or notice.¹¹⁸ Many shareholders of large corporations are passive, inactive investors who focus little on the daily decisions of their boards. In fact, many minority shareholders of large, public corporations are unaware that they even hold shares in a particular corporation because they are invested in funds that hold the individual shares of stock.¹¹⁹ Few common shareholders in large public corporations know what stock they own, let alone whether those companies are spending money to be politically active or maximizing profits for their shareholders.¹²⁰ Shareholders of closely-held corporations, in contrast, are well aware of their interests in their businesses, and are active in maximizing profits because they have no other salary on which to rely.¹²¹

¹¹⁵ See *Brodie v. Jordan*, 857 N.E.2d 1076, 1081 (Mass. 2006).

The squeezers [those who employ the freeze-out techniques] may refuse to declare dividends; they may drain off the corporation's earnings in the form of exorbitant salaries and bonuses to the majority shareholder-officers and perhaps to their relatives, or in the form of high rent by the corporation for property leased from majority shareholders . . . ; they may deprive minority shareholders of corporate offices and of employment by the company; they may cause the corporation to sell its assets at an inadequate price to the majority shareholders

Id. at 1079 (citation omitted).

¹¹⁶ See FLETCHER, *supra* note 110.

¹¹⁷ *Citizens United v. FEC*, 130 S.Ct. 876, 977 (2010) (Stevens, J., dissenting).

¹¹⁸ 8 DEL. C. § 122 (2011).

¹¹⁹ Usha Rodrigues, *Citizens United: First Corporate Thoughts*, THE CONGLOMERATE (Jan. 24, 2010), <http://www.theconglomerate.org/2010/01/many-have-already-weighted-in-on-citizens-united-mostly-focusing-on-its-first-amendment-implications-im-a-private-law-type-w.html>.

¹²⁰ *Id.*

¹²¹ See, e.g., *Brodie v. Jordan*, 857 N.E.2d 1076, 1081 (Mass. 2006) (“[Remedies] should attempt to reset the proper balance between the majority's ‘concede[d] . . . rights to what has been termed ‘selfish ownership,’” and the minority's reasonable

Ultra vires and waste are corporate law doctrines that could potentially aid a dissatisfied shareholder who feels corporate funds are being utilized inappropriately. Corporate waste is a common law doctrine that allows shareholders to bring suit against directors who irrationally squander or give away corporate assets.¹²² The doctrine of *ultra vires* is codified in many state corporate codes and permits shareholders to seek an injunction against a corporation's directors to prevent unauthorized acts or the improper use of granted powers.¹²³ The burden for establishing both waste and *ultra vires* is very high since corporations are frequently authorized to engage in any lawful business.¹²⁴ Most courts tend to apply the business judgment rule, which prevents them from second-guessing management.¹²⁵ Moreover, small business owner-managers likely lack the funds to bring such a lawsuit. Attorneys' fees alone may total more than the independent expenditure itself and it is often the corporation that pays the cost of litigation brought on its behalf.¹²⁶

Though Justice Stevens commented during the *Citizens United* oral argument that *ultra vires* frequently prohibits the common corporate practice of contributing to charities,¹²⁷ state courts and legislatures disfavor *ultra vires*.¹²⁸ Every state has enacted legislation that either abolishes or limits *ultra vires*.¹²⁹ Although generally asserted as a defense to breach of contract, an *ultra vires* act could also arise if a corporation or director takes an action inconsistent with a current statute. Corporations have, however, broad "discretionary authority to enter into contracts and transactions which may be deemed reasonably incidental to its business purposes."¹³⁰

expectations of benefit from its shares." (citation omitted)). See also 18B AM. JUR. 2D *Corporations* §§ 1737–38 (2012).

¹²² Michael W. Peregrine, James R. Schwartz & William W. Horton, *Delaware Supreme Court Affirms Disney, Continuing Vitality of Business Judgment Rule*, AM. HEALTH LAWYERS ASSOC. 1 (Aug. 2006), available at <http://www.mwe.com/info/pubs/ahla0806.pdf>.

¹²³ 8 DEL. C. § 124 (2011). *Ultra vires* is Latin for "beyond the powers." 18B AM. JUR. 2D *Corporations* § 1732 (2012).

¹²⁴ See Peregrine et al., *supra* note 122, at 4.

¹²⁵ See *id.* at 1, n.1. The business judgment rule presumes that the board of directors acted in good faith, and on an informed basis to make a business decision in the best interests of the corporation. *Id.* Challenging shareholders must demonstrate fraud, bad faith, or self-dealing to prevail, not merely that the decision ultimately turned out to be imprudent. *Id.*

¹²⁶ Many corporate charters include exculpatory provisions for their directors under 8 DEL. C. § 102(b)(7), which means in certain circumstances, the corporation pays the judgment shareholders won against the director(s) on behalf of the corporation.

¹²⁷ Transcript of Oral Argument at 56, *Citizens United v. FEC*, 130 S. Ct. 876 (2010) (No. 08-205) (reargued Sept. 9, 2009).

¹²⁸ See FLETCHER, *supra* note 110, at § 3407.

¹²⁹ *Id.*

¹³⁰ FLETCHER, *supra* note 110, at § 2486.

An allegation of corporate waste is equally unlikely to aid a dissenting shareholder. In order to prove waste, the plaintiff-shareholder must prove that the action was "so one sided that no business person of ordinary, sound judgment could conclude that the corporation has received adequate consideration."¹³¹ Actions that have a rational business purpose do not sustain a claim of waste.¹³² Corporate waste is rarely a successful charge; it can fail even when a decision ultimately costs the corporation a significant amount of money. For example, the board of directors of the Walt Disney Company hired and subsequently fired Disney's chief operating officer without cause after only fourteen months, triggering a \$130 million severance package.¹³³ Despite the extraordinary cost to Walt Disney Company, the directors were found to have acted with a rational business purpose in creating the contract because they had had to entice the chief operating officer away from his prior employment.¹³⁴ In order to successfully plead corporate waste and survive a 12(b)(6) dismissal, the allegations must be accompanied by specific instances of fraud or bad faith.¹³⁵ Pleading is merely the first hurdle plaintiffs face, however, as they still must present a case strong enough to survive courts' broad deference to management.

C. *A Unique Tax Consequence for Closely-Held S Corporations*

Congress declared campaign spending non-deductible by individuals and businesses in I.R.C. § 276.¹³⁶ A deduction for contributions to non-profit organizations that participate in or attempt to influence legislation or the election of a candidate for office is also disallowed, even if the organizations otherwise qualify as charities.¹³⁷ Though both incorporated and unincorporated companies are banned from deducting political contributions for federal tax purposes, pass-through entities have a unique disadvantage: the subsidization of corporate political spending by owners.¹³⁸

¹³¹ *In re Walt Disney Co. Derivative Litigation*, 906 A.2d 27, 74 (Del. 2006) (quoting *Brehm v. Eisner*, 746 A.2d 244, 263 (Del. 2000)).

¹³² *Id.*

¹³³ *Id.* at 46.

¹³⁴ *Id.* at 75.

¹³⁵ *Stern v. Gen. Elec. Co.*, 924 F.2d 472, 476 (2d Cir. 1991).

¹³⁶ I.R.C. § 276 (2006); Treas. Reg. § 1.276-1(c) (1969).

¹³⁷ I.R.C. § 170(c)(2)(D) (2006). Common pass-through entities are S-Corps, partnerships and limited liability companies. Jeff Fouts, *Pass-Through Entity Defined* (Dec. 1, 2006), http://www.taxhelpattorney.com/irs/irm_08-019-001-d0e35.html.

¹³⁸ Andrew Oh-Willeke, *What Are the Tax Implications of Citizens United?*, WASH PARK PROPHET (Jan. 22, 2010, 12:05 PM), <http://washparkprophet.blogspot.com/2010/01/what-are-tax-implications-of-citizens.html>. Shareholders of S-Corps can see a substantial tax benefit from the corporation by making an independent

By definition, the owners of pass-through entities share in the profits of their businesses.¹³⁹ This means that businesses earning a net profit are not federally taxed at the entity level. Instead, net income is “passed through” to the tax returns of the owners. Because political contributions and expenses are non-deductible,¹⁴⁰ a political expenditure is not subtracted from taxable income. Despite the outlay of cash, owners receive no tax benefit. Therefore, each owner effectively pays personal income tax on his share of the money used to make the expenditure.¹⁴¹

Conversely, shareholders in regular corporations (“C-Corps”) see minimal tax effect from corporate political expenditures. C-Corps are subject to double taxation, but only the corporation must pay tax on corporate profits.¹⁴² Shareholders are only responsible for income tax on the dividends they receive.¹⁴³ Unlike the owners of pass-through entities, who essentially pay tax on non-deductible amounts, shareholders of C-Corps do not pay personal income tax on corporate profits. Consequently, shareholders of C-Corps see no after-tax effect of corporate political spending unless it reduces their dividend amount.¹⁴⁴

Even in troubled economic times, where tax planning professionals earn six-figure salaries to reduce tax liabilities, the negative tax effect of political spending seems small until compared to the full deductibility of charitable contributions. Contributions made to qualified charitable organizations are deductible to a certain extent by all profit-making entities.¹⁴⁵ S-Corps do, however, have a slight advantage over C-Corps in the limit of deductible charitable contributions. A C-Corp’s charitable contribution deduction is limited to 10% of its taxable income.¹⁴⁶ Since

expenditure rather than funding an individual shareholder’s contribution with an increase in salary (or a bonus) if the added compensation would have affect the marginal tax bracket of the shareholder. *Id.*

¹³⁹ I.R.C. §§ 1363, 6031 (2006).

¹⁴⁰ I.R.C. § 170(c)(2)(D).

¹⁴¹ Oh-Willeke, *supra* note 138 (“In an S corporation, the non-deductibility of campaign spending means that political spending is effectively paid for out of the after tax profits of the company, with shareholders each paying their own marginal tax rate on their respective shares of the funds used to make the contributions.”).

¹⁴² I.R.C. § 11 (2006).

¹⁴³ I.R.C. § 316 (2006).

¹⁴⁴ Though cash dividends have become more popular in the years since 2003, corporations have a number of options to reward shareholders in ways that have an even lesser tax effect, like stock dividends or reinvestment of corporate profits. See James E. McWhinney, *Dividend Tax Rates: What Investors Need to Know*, INVESTOPEDIA (Mar. 6, 2011), <http://www.investopedia.com/articles/06/JGTRRADividends.asp#axzz1dRRLKrzy>; INTERNAL REVENUE SERV., PUBLICATION 17 (2010): YOUR FEDERAL INCOME TAX, available at <http://www.irs.gov/publications/p17/ch08.html>.

¹⁴⁵ I.R.C. § 170 (2006).

¹⁴⁶ *Id.*

pass-through entities are not taxed at the entity level, an S-Corp's charitable contributions are allocated among owners and deductible up to 50% of the owner's taxable income.¹⁴⁷ In effect, charitable contributions reduce the overall tax liability of a business, whereas political expenditures have no tax benefit.

D. *Are Small Businesses Being Overshadowed by the Big Players?*

Citizens United gives all corporations—large and small—the same right to make independent political expenditures from their general treasuries. Any owner of a small business remains able to spend money as an individual, but *Citizens United* enables shareholders to use their corporation to convey a political message.¹⁴⁸ Some small businesses are indistinguishable from their individual owners, but *Citizens United* treats all corporations the same as their unincorporated counterparts.¹⁴⁹ However, *Citizens United* benefits larger corporations more than incorporated or unincorporated small businesses. Independent political corporate spending has been predicted to escalate, since corporations will necessarily have to continue demonstrating support for candidates to maintain access and avoid retribution.¹⁵⁰ Corporations have the power to affect the legislative process and are often directly affected by enacted legislation while enjoying “vastly more money with which to try to buy access and votes.”¹⁵¹

Most large corporations can easily outspend small corporations and business associations from their general treasuries, dwarfing the impact of the political message of a mom-and-pop establishment.¹⁵² The median S-Corp made only \$100,000 in profit in 2007, compared to large public corporations which averaged more than \$380,000.¹⁵³ Though there is a

¹⁴⁷ *Id.*

¹⁴⁸ See Transcript of Oral Argument, *supra* note 127, at 55.

¹⁴⁹ See *Expenditures*, *supra* note 14.

¹⁵⁰ *Citizens United v. FEC*, 130 S. Ct. 876, 973 (2010) (Stevens, J., dissenting) (“A system that effectively forces corporations to use their shareholders’ money both to maintain access to, and avoid retribution from, elected officials may ultimately prove more harmful than beneficial to many corporations.”). See also Supp. Brief for Committee for Economic Development as Amici Curiae Supporting Appellee at 10–19, *Citizens United*, 130 S. Ct. 876 (No. 08-205).

¹⁵¹ *Citizens United*, 130 S. Ct. at 965 (Stevens, J., dissenting) (“In an age in which money and television ads are the coin of the campaign realm, it is hardly surprising that corporations deployed these ads to curry favor with, and to gain influence over, public officials.”).

¹⁵² *Id.* (“[T]he Fortune 100 companies earned revenues of \$13.1 trillion during the last election cycle.”) (citation omitted).

¹⁵³ Scott Shane, *How Much do Small Business Owners Make?*, SMALL BUS.

TRENDS (Nov. 15, 2010), <http://smallbiztrends.com/2010/11/how-much-money-do-small-business-owners-make.html> (describing how the average sole proprietorship made only \$11,696 in 2007). Large public corporations, in contrast, averaged over

great spread in earnings across industries, sole proprietors reported a drop in profits of nearly 7.5% in 2009 following three consecutive years of decline.¹⁵⁴ Increasingly, as the 2012 contest for the Republican presidential nomination unfolds, it is the top 0.01% “mega-money” supporters that are controlling the political race rather than an accumulation of small donations.¹⁵⁵ Candidates know, whether from the increased disclosure requirements or the straightforward admissions of supporters, who is directly or indirectly contributing the most to their campaigns. “Super-wealthy supporters with strong corporate power bases” may not be determining election results outright, but they are certainly having an impact on the campaign finance dynamic.¹⁵⁶

Some businesses suggest they want limits on political spending to avoid a “political spending arms race” and the pay-to-play atmosphere that has arisen post-*Citizens United*.¹⁵⁷ Because of unlimited spending and limited disclosure, the actual promoters of political spending are hidden from the public, though they spend millions more than their small counterparts can.¹⁵⁸ Both Citigroup and Pfizer supported a 2011 report that outlined the negative effects of secrecy and unrestrained spending in campaign finance.¹⁵⁹ The trend toward pay-to-play political spending could have a

\$380,000 in 2007. See INTERNAL REVENUE SERV., 2007 STATISTICS OF INCOME: CORPORATE INCOME TAX RETURNS 1, 19, available at <http://www.irs.gov/pub/irs-soi/07cocr.pdf>.

¹⁵⁴ Jason Paninos & Scott Hollenbeck, *Statistic of Income Bulletin: Sole Proprietorship Returns, 2009*, IRS.GOV, 1, 12 (Summer 2011), available at <http://www.irs.gov/pub/irs-soi/11spsumbulspreturns.pdf>.

¹⁵⁵ Carl Pope, *Citizens United or Not, We Aren't Helpless*, HUFFPOST POL. (Jan. 12, 2012, 9:42 AM), http://www.huffingtonpost.com/carl-pope/citizens-united-or-not-we_b_1200449.html.

¹⁵⁶ *Id.*

¹⁵⁷ See George Zornick, *Big Business: Undo the Damage of 'Citizens United'*, THE NATION (Sept. 28, 2011, 12:17 PM), <http://www.thenation.com/blog/163685/big-business-undo-damage-citizens-united> (discussing how \$298 million was spent by political committees and organizations (six times what was spent in the 2006 mid-term elections); only about half of the money came from donors who were required to be disclosed).

¹⁵⁸ COMM. FOR ECON. DEV., *Hidden Money: The Need for Transparency in Political Finance* 1 (2011), available at <http://www.ced.org/images/content/events/moneyinpolitics/2011/hiddenmoney.pdf> (reporting that the Campaign Finance Instituted estimated that organized groups may have spent \$564 million on federal elections in 2010 while only disclosing \$300 million).

¹⁵⁹ Zornick, *supra* note 157.

Corporate resources that might be better spent investing in an enterprise or otherwise building shareholder value would then be diverted to political activities . . . Unrestrained corporate political spending encourages the pursuit of particular policy or regulatory benefits that may not serve the public's broad interests, or lead to

devastating effect on small businesses trying to match the spending of Fortune 500 companies in an effort to be heard, or stifle the political impact of small business political expenditures all together.

Though the data does not yet support the hypothesis that more and more money will be diverted from corporate treasuries as companies try to outspend their competitors, it has been only two years since *Citizens United*. Campaign spending has increased to non-disclosing organizations and Super PACs, but the negative effect on shareholder returns has yet to be seen. Several states have discussed legislation to give shareholders a voice in opposition to the expenditure of general treasury funds for political speech, though only one state has enacted legislation requiring shareholder approval or notification.¹⁶⁰

Unlike other, business-related uses for corporate money, there are no guarantees that supporting a candidate in a competitive political arena will result in election. Though money and incumbency are two extraordinarily influential factors in political races, outside forces exist as well.¹⁶¹ The top-fifteen fundraising gubernatorial candidates since 2000 spent at least \$30 million, and the top-two spenders were unsuccessful in their election campaigns.¹⁶² Generally, however, the big spenders are more likely to come away the victors.¹⁶³ In races where candidates and their associated or unassociated groups spend tens of millions of dollars campaigning for a single representative seat, small donations may go unnoticed. Individuals, like Eric Varvel, CEO of Investment Bank Credit Suisse, contribute hundreds of thousands of dollars to PACs with a single check.¹⁶⁴ For the small businesses that are breaking even in profits each year and desire to be politically active, contributions to organizations aligned with their interests may provide small business owners more “bang for their buck.” There were

political donations that are given with the intent of avoiding adverse consequences of legislative action.

Id.

¹⁶⁰ *Life After Citizens United*, NAT'L CONF. OF STATE LEGS. (Jan. 4, 2011), <http://www.ncsl.org/default.aspx?tabid=19607> (discussing how Iowa was the first to pass such legislation, though Michigan, Massachusetts, Minnesota, New Hampshire, North Carolina, Ohio, South Dakota, West Virginia and Wisconsin legislatures also debated similar proposals in 2010 before ultimately rejecting them).

¹⁶¹ Anne Sherwood, *Write the Check to “Gubernatorial Campaigns”*, NAT'L INST. OF MONEY IN ST. POL. (Apr. 29, 2011), <http://www.followthemoney.org/blog/2011/04/write-the-check-to-gubernatorial-campaigns/>.

¹⁶² *Id.*

¹⁶³ Bob Biersack, *The Big Spender Always Wins?*, OPENSECRETS.ORG (Jan. 11, 2012, 3:50 PM), <http://www.opensecrets.org/news/2012/01/big-spender-always-wins.html>.

¹⁶⁴ Adam Smith, *Mitt's Big NYC Fundraiser*, PUB. CAMPAIGN ACTION FUND (Jan. 5, 2012, 8:11 PM), <http://campaignmoney.org/blog/2012/01/05/mitts-big-nyc-fundraiser>. Varvel contributed \$100,000 to a pro-Romney PAC in 2011. *Id.*

an estimated 27.5 million small businesses in 2009.¹⁶⁵ United, such strength in numbers can combat the big money influence that have arisen post-*Citizens United*.

E. *Retaliation: A Bigger Problem for Small Businesses?*

Retaliation occurs when individuals or groups attack groups with whom they disagree politically. Information gleaned from the mandatory public disclosure of political expenditure amounts can link companies to political groups that offend their customers.¹⁶⁶ For example, Target Corp. was the subject of retaliation in June 2010 for its political funding of a candidate outwardly opposed to same-sex marriage.¹⁶⁷ Target's \$150,000 contribution to MN Forward, a nonpartisan group supporting a single gubernatorial candidate, sparked boycotts and outrage across the Minnesota community where Target is headquartered.¹⁶⁸ Though Target's federal PAC, TargetCitizens, donates consistently to both Democrats and Republicans, the contributions to MN Forward became newsworthy because the funds came from the corporate treasury.¹⁶⁹ Despite Target's assertion that it spent the funds "based strictly on issues that affect [its] retail and business objectives,"¹⁷⁰ some citizens continue to boycott Target.¹⁷¹ Likewise, websites associated with Koch Industries, a manufacturing and investments

¹⁶⁵ SBA, FREQUENTLY ASKED QUESTIONS, Jan. 2011, available at <http://www.sba.gov/sites/default/files/sbfaq.pdf>.

¹⁶⁶ See Sean Parnell, *Attacks on Political Donors Demonstrate Dangers of Excessive Disclosure*, CTR. FOR COMPETITIVE POL. (July 28, 2011, 10:21 AM), <http://www.campaignfreedom.org/blog/detail/attacks-on-political-donors-demonstrate-dangers-of-excessive-disclosure>.

¹⁶⁷ Brian Montopoli, *Target Boycott Movement Grows Following Donation to Support "Antigay" Candidate*, CBSNEWS POL. HOTSHEET (July 28, 2010, 4:10 PM), http://www.cbsnews.com/8301-503544_162-20011983-503544.html (showing how quickly Target became the target of Facebook groups and boycotts after a \$150,000 donation to a group backing a Republican gubernatorial candidate opposing same-sex marriage).

¹⁶⁸ Associated Press, *Target Spending Company Money on Candidates*, CBSNEWS (Nov. 2, 2010, 8:21 PM), <http://www.cbsnews.com/stories/2010/07/27/politics/main6717307.shtml?tag=contentMain;contentBody>.

¹⁶⁹ *Id.* (comparing Target and Best Buy, which donated \$100,000 to the same group but received less harsh public backlash).

¹⁷⁰ *Id.*

¹⁷¹ See Andrea Chang, *Target, Gay Rights Supporters at Odds Over How to Settle Dispute*, L.A. TIMES (Apr. 8, 2011), <http://articles.latimes.com/2011/apr/08/business/la-fi-target-gay-20110409> (describing how Target was forced to spend money in 2011 to combat the negative public image that arose after its \$150,000 contribution in advertising support for other antidiscrimination laws regarding sexual orientation and meeting with gay rights organizations).

conglomerate, faced system-crippling cyber attacks during 2011 for Koch's political contributions to several republicans.¹⁷²

Large, well-known companies like Target and Best Buy have been attacked for their political expenditures, but large companies face less ruinous consequences than small businesses that cannot afford the loss of patronage.¹⁷³ Small businesses, though permitted to make unlimited independent expenditures, may choose to stay silent in order to avoid alienating their local customers.¹⁷⁴ Little news coverage of retaliation against small donors exists. However, if retaliation is considered to be a serious threat, any business association may make the same contribution to non-disclosing groups like 501(c) and 527 organizations.

Though there is arguably little "anti-corruption" value in requiring disclosure for small contributions and expenditures,¹⁷⁵ disclosure is required for independent expenditures aggregating more than \$250 per election per year.¹⁷⁶ Despite the recent retaliation against Koch Industries and Target, only extremely controversial organizations could be judicially excepted from disclosing their donors.¹⁷⁷ If there is a "reasonable probability that the group's members would face threats, harassment or reprisals if their names were disclosed," a group may make a facial challenge to BCRA § 201 and

¹⁷² Parnell, *supra* note 166.

For a large company like Koch Industries, it may be that this sort of harassment is little more than a nuisance, something that they are easily able to afford the high-tech cyber security services needed to thwart such attacks. But imagine the plight of a small business owner who gave to the 'wrong' gubernatorial candidate in the eyes of an enraged activist, or to an advocacy group that has views on public policy that anger militant ideologues. Current and proposed disclosure requirements would leave these people and their businesses vulnerable to intimidation, harassment, cyber attacks and other assaults simply for giving a few hundred dollars to a candidate or interest group. For businesses that *rely on their web sites to generate sales*, attacks like those connected to Anonymous could be ruinous.

Id. (emphasis added).

¹⁷³ See Chang, *supra* note 171 ("We boycotted for a while . . . but that only lasted for so long because we had to go to Target. Gotta [sic] shop.").

¹⁷⁴ Parnell, *supra* note 166 ("Americans will opt to avoid the dangers associated with contributing, leaving only the most zealous or those wealthy enough to afford the needed security to support the candidates and causes they believe in.").

¹⁷⁵ *Id.*

¹⁷⁶ Bipartisan Campaign Reform Act § 201, 2 U.S.C. § 434 (2006); 11 C.F.R. § 109.10 (2011).

¹⁷⁷ Citizens United v. FEC, 130 S. Ct. 876, 916 (2010) (citing McConnell v. FEC, 540 U.S. 93, 198 (2003)).

keep its donors secret.¹⁷⁸ That route, however, requires costly litigation and “specific evidence about the basis for [the] concerns.”¹⁷⁹

Though small business concerns about retaliation are certainly legitimate, thus far only large, public corporations making large contributions have been the subject of attacks. In the 2010 mid-term election cycle, only three corporations made independent expenditures under *Citizens United*.¹⁸⁰ The largest single contributor, a family-owned construction company, DGS Construction, spent a mere \$40,000 on radio advertisements to successfully support a Maryland Congressional candidate.¹⁸¹ Penneco Oil, a family-owned Pennsylvania drilling company, spent \$5000 on billboards supporting two candidates for federal office.¹⁸² The final corporate spender, Central Arizona Block Company, spent only \$2000 on radio advertisements unsuccessfully supporting a challenger to John McCain in the Arizona Republican Senate primary.¹⁸³ “Big money” contributions like Target’s \$150,000 contribution to MN Forward have simply not been made in the form of direct independent expenditures, let alone by small businesses. Accordingly, though retaliation is a very real threat, it has taken large sums of money expended on highly controversial issues to become a reality.

F. Obama’s Proposed Executive Order: Mandatory Disclosure for Government Contractors

The Obama Administration drafted an Executive Order in April 2011, which would have required government contractors to disclose their political spending in an effort to increase transparency in government contracts.¹⁸⁴ The draft Order has not been formally issued, but its public release demonstrated the Obama Administration’s support for increased

¹⁷⁸ *McConnell*, 540 U.S. at 198, *overruled by Citizens United*, 130 S. Ct. 876 (“[O]ur rejection of plaintiffs’ facial challenge to the requirement to disclose individual donors does not foreclose possible future challenges to particular applications of that requirement.”).

¹⁷⁹ *Id.*

¹⁸⁰ See Smith, *supra* note 56.

¹⁸¹ *Id.* (discussing how the percentage of funds expended by non-disclosing organizations from corporate treasuries is unknown, but that amount is far less than the amount spent by candidates themselves).

¹⁸² *Id.* (Penneco Oil’s support for a candidate for the U.S. House was insufficient to help him oust the incumbent, who outspent his opponent by nearly \$300,000).

¹⁸³ *Id.* (discussing how Central Arizona Block Company’s support may have seemed substantial to Deakin (the challenger) who spent \$70,000 for the primary, but was negligible when compared to McCain’s \$21 million).

¹⁸⁴ Barack Obama, Draft Exec. Order: Disclosure of Political Spending by Government Contractors, Apr. 13, 2011, *available at* <http://www.ombwatch.org/files/regs/drafteogvtcontractordiscl.pdf>.

disclosure “to ensure the integrity of the federal contracting system” and avoid undue influence in all stages of the process.¹⁸⁵ Added disclosure could also impact accountability and reduce the pay-to-play corruption that has arisen in the state contracting process if state governments follow the Obama Administration’s lead.¹⁸⁶ Government contracts can be lucrative, but the opportunity for abuse is great. For example, government officials in Massachusetts helped a contractor avoid scrutiny and submit a final cost of \$22 billion for a public works project, reportedly for well-timed contributions totaling \$225,000.¹⁸⁷

Small businesses could be affected by the draft executive order should the administration move forward with the policy. Whether that effect would be negative or positive depends on the political activism of the company. According to the Small Business Administration, a substantial portion of government spending is targeted toward small businesses.¹⁸⁸ Small businesses that are politically active could face an “onerous burden” when bidding for government contracts if political spending becomes a factor in the awarding of contracts.¹⁸⁹ On the other hand, if political spending becomes a factor in awarding contracts, executive agencies may choose to bypass large companies spending thousands on lobbying and political advocacy to avoid the appearance of pay-to-play, and instead award contracts to small, less politically active businesses.

G. *What Does It Take to Comply with Citizens United?*

Though *Citizens United* altered the campaign finance landscape, little has changed since 2002 regarding federal disclosure requirements. A business seeking to comply with the FEC regulations and related Supreme Court decisions must know the following three things: (1) what type of

¹⁸⁵ *Id.*

¹⁸⁶ Elizabeth Kennedy & Adam Skaggs, *The People’s Business: Disclosure of Political Spending by Government Contractors*, BRENNAN CTR. FOR JUST. (June 16, 2011), available at http://brennan.3cdn.net/aa6070a3f62a5e386c_stm6bh1h7.pdf.

¹⁸⁷ *Id.* See also Fred Schulte & Aaron Mehta, *Obama Rainmakers Enjoy White House Invites, Appointments and Contracts*, HUFFPOST POL. (Jan. 19, 2012), http://www.huffingtonpost.com/the-center-for-public-integrity/obama-rainmakers-enjoy-wh_b_1215548.html.

¹⁸⁸ See *Contracting Opportunities*, SBA.GOV, <http://www.sbaonline.sba.gov/contractingopportunities/index.html> (last visited Dec. 2, 2011) (describing the SBA’s most recent analysis indicates that government agencies have established goals, with about 23% of all buying going toward small businesses.).

¹⁸⁹ Henry Schweiter, *Proposed Executive Order Requiring Disclosure of Political Spending by Government Contractors: A Recipe for Politicizing an Apolitical Process*, MCKENNA LONG & ALDRIDGE (May 18, 2011), available at http://www.mckennalong.com/media/library/1496_Political%20Spendind%20Disclosure%205.18.11.pdf.

entity will be making the expenditure; (2) what type of expenditure is being made; and (3) to what type of organization, if any, the money is going. A partnership, for instance, can make a direct contribution to a candidate running for federal office, whereas a corporation may only donate to a candidate through a PAC. Any domestic entity may make independent expenditures or engage in electioneering; however, expenditures in excess of \$10,000 must be accompanied by FEC Form 5 within 48 hours after the expenditure or risk a civil fine up to \$16,000.¹⁹⁰ Furthermore, certain communications advocating against or on behalf of an identified candidate require a noticeable disclaimer in the communication.¹⁹¹ Even the most profitable small business cannot afford the civil and criminal penalties the FEC can impose.

Nearly every state has similar requirements as the federal campaign finance rules, yet some state governments impose more restrictive limits or additional administrative hurdles than their federal counterpart.¹⁹² In addition to complying with federal campaign finance law, a business must be sure to act according to its home state's laws as well. Federal independent expenditures are not subject to state campaign finance limits, but registration, reporting and disclosure requirements exist under state law.¹⁹³ Rules limiting the source of the funds used as political speech exist as well.¹⁹⁴ Violations can result in costly civil fines and criminal penalties;¹⁹⁵ despite the confusing campaign finance regime, the utmost care should be taken to ensure compliance.

IV. CONCLUSION

In theory, small businesses have an advantage over large corporations because small business owners actively participate in daily decisions. Small businesses are at a disadvantage, however, because of their relative size. In reality, small businesses do not have the financial capability to take advantage of the freedom allowed by *Citizens United*. Though *Citizens United* put small corporations on the same footing as all other business entities, it did little else to increase the impact of small business in political campaigning. Notably, it was three small, family-owned corporations that took advantage of *Citizens United* to directly make independent expenditures. Their impact was minimized, however, by the flood of money into the race from the ruling's newest creation: the Super PAC. *Citizens United* has served to decrease the transparency of donors and open the floodgates for anonymous big spenders in political campaigns. The Court

¹⁹⁰ 11 C.F.R. §§ 104.4(e), 109.10 (2012).

¹⁹¹ 2 U.S.C. § 434 (2006).

¹⁹² *State Limits*, *supra* note 73.

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ 11 C.F.R. § 104.4(e); 11 C.F.R. § 109.10.

upheld the BCRA disclosure provisions yet opened the door for non-disclosing organizations to take the lead role in campaign spending and muffle the political voice of small business. Instead of spending general treasury funds on independent expenditures, corporations have sent their money to Super PACs and 527 organizations. Non-disclosing organizations' spending dramatically increased, further minimizing the relative impact of small businesses engaging in political speech. In effect, *Citizens United* relaxed the laws surrounding some forms of corporate political speech but did little to promote the interests of small businesses. *Citizens United* also did little to equalize the impact of outside spending in elections in a country where the political spending of the big players dwarfs even the profits of small businesses.